ARAB-MALAYSIAN MERCHANT BANK BHD

v.

ORIENT APPAREL BHD

HIGH COURT MALAYA, IPOH
KANG HWEE GEE J
[COMPANIES (WINDING-UP) 28-60-1998]
25 MARCH 1999

CIVIL PROCEDURE: *Affidavits - Jurat - Jurat not in same page as content of affidavit - Whether non-compliance renders affidavit defective - Authenticity of affidavit - Whether in issue*

COMPANY LAW: *Winding-up - Opposition to petition - Service of affidavits in opposition did not comply with Companies (Winding-up) Rules 1972, r. 30 - Whether such affidavits ought to be admitted - Companies (Winding-up) Rules 1972, r. 194(1)*

COMPANY LAW: *Winding-up - Statutory notice of demand - Amount stated in notice less than amount due - Issuance of a second letter of demand the next day - Whether petitioner had abandoned its statutory notice - Whether valid - Notice not complied with - Companies Act 1965, s. 218(2)*

COMPANY LAW: *Winding-up - Insolvency - Just and equitable ground - Opposition to winding-up - Application by contributories and secured creditor to stay or dismiss petition - Merits of application - Whether respondent company insolvent and unable to pay debts - Companies Act 1965, s. 218(1)(e) - Whether wish of unsecured creditors prevails over that of secured creditor*

The petitioner had petitioned for the winding-up of the respondent under s. 218(1)(e) of the Companies Act 1965 ('the Act") on the following grounds: (i) the respondent had failed to pay the petitoner a debt amounting to RM3,027,183.78 as demanded in the petitioner's statutory notice; (ii) the respondent was insolvent and unable to pay its debts; and (iii) it was just and equitable that the resondent be wound-up. The respondent did not object to the petition but instead supported the same together with 15 other creditors. The winding-up petition was however opposed by Hong Leong Bank Bhd, a secured creditor, and two contributories, Chen Mee Mee and Seow Chee Hoong, who were shareholders of the respondent, on grounds, *inter alia,* that the respondent's business was still a going concern despite its debts, that it was able to generate a RM3 million income per month, and that it would not be in the interest of the unsecured creditors if a winding-up order was granted.

At the hearing of the petition, the parties raised several procedural objections, *inter alia*, the validity of the opposers' affidavits, the validity of the jurat in the affidavits, the fact that the contributories were no longer shareholders, and the validity of the statutory notice.

Held:

[1] Rule 194(1) of the Companies (Winding-up) Rules 1972 ('the Rules') provides that no proceedings shall be invalidated by any formal defect or irregularity unless the court is of opinion that substantial injustice has been caused which cannot be remedied by any order of the court. In this case, the irregularity did not cause any injustice to the petitioner, and the delay was inconsequential and could be safely condoned under r. 194(1) of the Rules.

[2] The rule that the jurat of an affidavit must immediately follow the end of the contents of the affidavit is endorsed as a practice that should be followed in drafting affidavits. However, the failure to follow this format does not invariably render such affidavits defective. Much would depend on whether the authenticity of the affidavit is in issue in which case the space between the end of the affidavit and the jurat would have to be considered by the court. In this case, the authenticity of the affidavits was not in issue.

[3] Only the respondent had the right to question the validity of the statutory notice. The secured creditor had no *locus standi* and had in fact trespassed into an area which rightfully only the respondent would be concerned with. In the absence of any allegation of fraud or collusion between the petitioner and the respondent, it must be taken for granted that the notice was regular and had been properly served. In any case, the discrepancy was so trivial and in favour of the respondent that it could not have been prejudiced and could easily be condoned under r. 194 of the Rules. Further, the second letter of demand was merely a solicitors' letter of demand for repayment of debt without any reference to the threat of commencing winding-up proceedings; it could not have the effect of invalidating the statutory notice.

[4] The test of insolvency is not whether a company's liabilities exceed its assets but whether it is able to meet current demands upon it, ie, whether it is commercially insolvent. Based on the preliminary report by the provisional liquidator and the report from Arthur Andersen, the court was satisfied that the respondent was not only commercially but hopelessly insolvent.

[5] Apart from the question of insolvency the court had to consider the intrinsic economic interests of the contributory shareholders and the secured creditor as against the collective interests of the 15 unsecured supporting creditors. The unanimous wish of the unsecured creditors must prevail over that of the bank which was a secured creditor.

[Winding-up order granted.]

Case(s) referred to:

Bowes v. Hope Life Insurance & Guarantee Co [1865] 11 HLC 389 ***(refd)***
Certico Sdn Bhd v. The Tropical Veneer Co Bhd [1988] 1 MLJ 665 ***(foll)***
Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank [1997] 3 CLJ 485 ***(dist)***
Malayan Plant Pte Ltd v. Moscow Narodny Bank Ltd [1980] 2 MLJ 53 ***(refd)***
Re Craven Insurance Co Ltd [1968] 1 All ER 1144 ***(refd)***
Re Home Assurance Association [1971] LR 12 Eq 112 ***(refd)***
Re International Contract Co Ltd 14 LT 726 ***(refd)***
Re LHF Wools Ltd [1970] Ch 27 ***(refd)***
Re Perusahaan Jenwatt Sdn Bhd [1990] 2 MLJ 178 ***(dist)***
Re Presha Engineering (Australia) Pty Ltd [1983] 1 ACLC 675 ***(refd)***
Re Sanpete Builders (S) Pte Ltd [1989] 1 MLJ 393 ***(refd)***
Re St Thomas Dock Co [1876] 2 Ch D 116 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd [1992] 1 CLJ 637 ***(refd)***
Tahansan Sdn Bhd v. Tay Bok Choon [1984] 2 CLJ 224 ***(refd)***
Voon Mow Chen v. Menteri Dalam Negeri & Anor & Ors Cases [1993] 4 CLJ 195 ***(not foll)***
YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Bhd [1996] 3 CLJ 51 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (2)(a), 221(1), 294
Companies (Winding Up) Rules 1972, rr. 30, 194(1)

For the petitioner - En Selvanathan; M/s Kean Chye & Sivalingam
For the respondent - Prakash Menon (Steven KP Puung with him); M/s Isharidah, Ho, Chong & Menon
For the supporting creditor - Alex Anthony (Md Tahir Abdul Mutalib with him); M/s Anthony Chew & Lim

Reported by Farah Naim

JUDGMENT

Kang Hwee Gee J:

This is a petition to wind-up the respondent company, a garment manufacturer, on the ground that it was unable to pay its debt of RM3,027,183.78 under s. 218(1)(e) of the Companies Act 1965.

The grounds of the petition are described by the following relevant paragraphs of the petition:

1. Orient Apparel Berhad (hereinafter called "the Company") was on the 30th May 1983 incorporated under the Companies Act 1965.

2. The registered office of the Company is at No. 14A, Jalan Chew Sin Onn, Ipoh, Perak.

3. The nominal capital of the Company is RM25,000,000.00 divided into 25,000,000.00 shares of RM1.00 each. The amount of the capital paid up or credited as paid up is RM21,500,000.00.

4. The objects for which the Company was established are as follows:

> To carry on the business of manufacturing and dealing in and with clothing, wearing apparel and accessories of all kind and other objects set forth in the memorandum of association thereof.

5. The Company is indebted to your Petitioner in the sum of RM3,027,183.78 in respect of a RM3,000,000.00 Joint Bankers Acceptance/Revolving Credit Facility granted by your Petitioner to the Company on 22nd September 1997.

6. On the 13th of July 1998, your Petitioner served on the Company by leaving with it, at its registered office and also its business address at Wisma OAB, No. 7, Persiaran Perusahaan Kledang Utara 1/5, Kawasan Perindustrian Chandan Raya, 31450 Menglembu, Perak, a demand under his hand dated the 9th of July, 1998, requiring the Company to pay the said sum, which demand was in the following terms:

> Take notice that we have our client's instructions to demand from you, pursuant to section 218(2)(a) of the Companies Act 1965 the said sum of RM3,027,183.78 (RM697,883.16 + RM2,329,350.62) due from you to our client under the abovementioned facility and that you are required to pay us as solicitors or to our client directly the sum of RM3,027,183.78 within twenty one (21) days from the date of receipt of this notice, failing which, you shall be deemed unable to pay your debt and appropriate action will be taken for the winding up of Orient Apparel Bhd. without further reference to you.

7. Over twenty one (21) days have now elapsed since your Petitioner served the said demand, but the Company has neglected to pay or satisfy the said sum, or any part thereof, or to make any offer to your Petitioner to secure or compound the same.

8. The Company is insolvent and unable to pay its debts.

9. In the circumstances, it is just and equitable that the Company should be wound up.

10. Your Petitioner therefore humbly prays as follows:

    (a) That Orient Apparel Berhad may be wound up by this Honourable Court under the provisions of the Companies Act 1965;

    (b) Further or such other orders as shall in the circumstance be just.

The respondent Orient Apparel Bhd. did not object to the petition. Instead it supported the petition together with 15 other creditors.

On 27 October 1998 before the hearing of this petition a provisional liquidator was appointed by the court on the application of a major creditor of the respondent Md. Tahir bin Abdul Mutalib with the consent of the respondent. The report prepared subsequently by the provisional liquidator showed that the respondent was insolvent.

Opposers

The petition was opposed by two contributories, Chen Mee Mee and Seow Chee Hoong. The former was a minor shareholder and a former Executive Director of the respondent. The latter was a substantial shareholder, holding 50.12% of the 10,775,000 shares of the respondent and was a former director.

The petition was also opposed by a secured creditor Hong Leong Bank Bhd whose interests were secured under:

(i) a Letter of assignment dated 2 January 1998

(ii) a Loan Agreement dated 10 April 1998

(iii) a Debenture dated 10 April 1998

(iv) an Account Assignment dated 10 April 1998

(v) a Supplemental loan Agreement dated 4 May 1998

(vi) a Letter of Assignment from the respondent dated 18 June 1998

(vii) a Second Supplemental Loan Agreement dated 1 October 1998.

Basically, the substantive grounds advanced by the contributories and the secured creditor were that the respondent business despite its debt is still a going concern with orders from overseas which orders to be fulfilled until December 1998 and would be able to pay its creditors at a future date; that if winding up is ordered, over 1000 workers of the respondent would lose their employment; that the minority shareholding would not be protected; that even if a winding up is ordered the unsecured creditors would not gain anything as all the respondent's assets were secured in favour of Hong Leong Bank Bhd., and that there was a verbal or implied agreement between the creditors not to institute a winding up proceeding pending the acceptance of a debt restructuring scheme to be put up by a public accountant.

The Procedural Objections

A number of procedural objections were raised by the parties in the course of the trial and also in the affidavits of the opposers. I shall deal with them before I consider the substance of this petition.

Opposers' Affidavits Filed And Served Less Than Seven Days Before Hearing Contrary To Rule 30

Rule 30 of the Companies (Winding Up) Rules 1972 reads as follows:

> 30 Affidavits opposing the petition and affidavits in reply
>
> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy there – of served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.
>
> (2) Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor.

The petition was fixed for hearing on 10 November 1998. The secured creditor Hong Leong Bank Bhd. filed (and served) its affidavit on 4 November 1998. The contributories Seow Chee Hoong and Chen Mee Mee filed their affidavits on 6 November and 7 November 1998 respectively. Counting the days backward from the date of hearing (10 November) it would appear that only Hong Leong Bank Bhd. had filed its opposing affidavit within time. Counsel for the petitioner Encik Chin Hein Choong contended that the Court of Appeal in *Crocuses & Daffodils (M) Sdn. Bhd v. Development & Commercial Bank* [1997] 2 MLJ 756 at 762 had now ruled that r. 30 is mandatory and opposers who are out of time could not be heard.

In the *Crocuses'* case the opposer filed an affidavit to oppose the winding up only two days before the date the petition was due to be heard on 24 September 1992. The petition was postponed a number of times in the course of which the opposer filed three more affidavits, one two days and the other two only one day before the petition was due to be heard. When the petition was finally heard nearly four years later on 24 November 1995, the petitioner objected to the admissibility of the affidavits on ground that they had contravened r. 30. It was held that the High Court was right in allowing the objection considering the opposer had blatantly disobeyed r. 30 which was construed to be mandatory in nature.

Having read *Croucuses* carefully it would appear to me that all the Court of Appeal had ruled in that case was that r. 30 was mandatory in nature. It did not however consider the power of the court to condone the irregularity under r. 194(1) of the Companies (Winding-up) Rules 1972 which provides that no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularities and that the unjustice cannot be remedied by any order of the court. It follows therefore the Court of Appeal's decision in *Crocuses* must be construed to apply only to the factual pecularity of that case.

In the instant case, it is clear to me that the irregularity did not cause any injustice to the petitioner in any way – the opposers being merely two or three days out of time. The delay was inconsequential to the process of the petition and could be safely condoned under r. 194(1). I would not therefore preclude their representation in this petition.

Jurat In The Affidavit Of The Opposers

Encik Rajasooria, counsel for one of the supporting creditors, Md. Tahir bin Abdul Mutalib, and Encik Prakash counsel for the respondent raised the objection that the jurats of affidavits of the opposers were not on same page as the content of the affidavits and should not therefore be accepted. They submitted that in the recent case of *Voon Mow Chen v. Menteri Dalam Negeri & Anor. and Five Other Cases* [1993] 4 CLJ 195 the High Court had ruled that "an affidavit where the jurat begins and ends on a fresh page and does not immediately follow the end of a substantive or spill-over of the last substantive averment of the deposition is also defective for lack of indication that the jurat relates directly to the deposition".

In so far as it was ruled that a jurat in an affidavit must follow immediately the end of the content of the affidavit, I would respectfully endorse it as a practice that should be followed by all those concerned in drafting affidavits. I would not however go so far as to agree that a failure to follow the format

suggested would render all such affidavits defective. Much would depend on whether the authenticity of the affidavit is an issue in which case the space between the end of the affidavit and the jurat would have to be considered by the court. In the instant case the authenticity of the affidavits was not in issue. The objection is clearly trivial, irrelevant and not purposive. It must accordingly be rejected.

That The Contributories Were Not Shareholders

It was contended by counsel for the respondent that at the time they filed their affidavits to oppose the petition, Seow Chee Hoong and Chen Mee Mee having disposed of their shares in the respondent company, were no longer shareholders. They were therefore not contributories and therefore had no *locus standi* to oppose.

However, the respondent despite this claim has not been able to provide any evidence in its register of members to show that the contributories were not at the date of the petition not shareholders. In the event I will have to accept the Registrar of Companies' Search Report dated 12 November 1998 as exhibited in the affidavit (encl. 72) of Seow Chee Hoong which states clearly that both Seow Chee Hoong and Chen Mee Mee were shareholders of the respondent as at 27 October 1998, as conclusive evidence of their status and their right to oppose as contributories.

The Statutory Notices

That the sum of RM3,027,183.78 was a debt due to the petitioner and that to-date the respondent had not paid up the sums demanded were not in dispute.

That the statutory notice had been left at the registered office of the petitioner is indisputable. This is clear from the affidavit of the petitioner's solicitor, Chin Hein Choong (in encl. 39 referring to the affidavit of the process server marked as exh. X) that the statutory notice was left at the registered office of the respondent on 13 July 1998. Also the respondent did not deny having received the notice. It must therefore be presumed that it was unable to pay its debt and may be wound up under s. 218(1)(e) of the Companies Act 1965.

However, counsel for the secured creditor submitted that the statutory demand was defective on two counts.

First, he contended that statutory demand (see exh. SCH-2 in encl. 30) was flawed in that it claimed an amount which was lesser than the amount actually owed by RM50. The amount in the statutory notice should have read as RM3,027,233.78 instead of RM3,027,183.78, a fact not denied by the petitioner or the respondent.

Secondly, he contended that after issuing the statutory demand of 9 July 1998, the petitioner issued a second letter of demand the next day 10 July 1998 (see exh. SCH-3 in encl. 30) demanding the same sum to be paid but within in a shorter period. He contended that by sending the second notice of demand the petitioner must be deemed to have abandoned its statutory demand.

He relied on the case of *Re Perusahaan Jenwatt Sdn Bhd.* [1990] 2 MLJ 178 and *Sri Hartamas Development Sdn Bhd v. MBF Finance Bhd.* [1992] 1 CLJ 637; [1992] 1 MLJ 313 for the proposition that strict compliance of the provision of s. 218(2) of the Act is a condition precedent to the deeming provision that the company is unable to pay its debt.

The objection raises the primary issue of whether any person other than the respondent has the *locus standi* to object. In questioning the validity of the statutory notice, the secured creditor had in fact trespassed into an area which rightfully only the respondent would be concerned with. The respondent itself had not deemed it necessary to question its validity and had in fact gracefully accepted it. In the absence of any allegation of fraud or collusion between the petitioner and the respondent, it must be taken for granted that the notice was regular and had been properly served.

Secondly, even assuming that the secured creditor and the contributories have the *locus standi*, the Court of Appeal had in *YPJE Consultancy Service Sdn Bhd v. Heller Factoring (M) Bhd* [1996] 3 CLJ 51; [1996] 2 MLJ 482, now ruled that even in instances where the notice had overstated the amount owing, this may not be necessarily fatal and it would still be legitimate to look into the circumstances in order to determine the critical issue upon which the application depends, namely whether or not the company is unable to pay its debt.

A close examination of the letter of demand (exh. A in encl. 39) does reveal that there was a minor mistake in the process of adding two sets of figures albeit to the advantage of the respondent as a lower sum (RM50 less) was being demanded in the statutory notice. But it is clear the sum demanded in the statutory notice was exactly the same as in the petition that there could be no ground to complain. In any case the discrepancy was so slight and was in favour of the respondent that it could not have been prejudiced in any way. If necessary, the discrepancy could be easily condoned under r. 194 of the Companies (Winding Up) Rules 1972. The strict compliance rule in the two cases, *Re Perusahaan Jenwatt* and *Sri Hartamas* cited by counsel would not apply under the circumstances as the amount demanded in the instant case was not in excess or greater than the debt due.

With respect to the submission that the second notice had invalidated the first statutory notice of demand, a close examination of the two letters indicates that unlike the first, the second was a mere solicitor's letter of demand for the repayment of debt made without any reference to the threat of commencing winding up proceedings. I fail to see therefore how it could have the effect of invalidating the statutory demand.

The Law

Having settled the procedural issues I shall now proceed to consider the substance of this petition – first, by setting out in brief that aspect of company law which has to be applied.

Under s. 218(1)(e) of the Companies Act 1965 the court may order the winding up of a company if the company is unable to pay its debt. Under s. 218(2)(a) a company shall be deemed to be unable to pay its debt if a notice of demand (called the statutory notice) of the debt is served on the company and it neglected to pay the sum due for three weeks thereafter or to secure or compound for it to the reasonable satisfaction of the creditor.

The former view that a creditor is entitled to a winding up order *ex debito justiciae* as propounded in Lord Cranworth's speech in *Bowes v. Hope Life Insurance and Guarantee Co.* [1865] 11 HLC 389 at 402 has now been displaced in favour of the modern approach that even where the respondent could not disprove the presumption of insolvency, the discretion still lies with the court in deciding whether a winding up should be ordered. (See *Re L.H.F. Wools Ltd.* [1970] Ch. 27 and followed by the Privy Council in the *Malayan Plant (Pte) Ltd. v. Moscow Narodny Bank Ltd.* [1980] 2 MLJ 53.) This is consistent with the statutory provision in s. 218(1) of the Act which uses the word "may" as opposed to the word "shall" order the winding up in the instances mentioned therein.

The grounds on which the court may exercise its discretion whether or not to wind up a company is however inexact and would depend on the circumstances prevailing in each case given the wide discretion under s. 221 of the Act to "dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order". But a court hearing a petition is obliged to consider the wishes of creditors and contributories before making an order of winding up. (See *Tahansan Sdn Bhd v. Tay Bok Choon* [1985] 1 MLJ 58 at 62 - per Wan Suleiman FJ, overruled by the Privy Council on other grounds).

Thus it may exercise its discretion to dismiss the petition where the majority of creditors oppose the winding up, and it can be shown that it would be advantageous for the company to continue its business so that the profits earned could be used to discharge the company's liabilities. See *Re Presha Engineering (Australia) Pty. Ltd.* [1983] 1 ACLC 675 as illustrated in *Malaysian and Singapore company Law & Practice* – CCH Asia Limited, The Information Professionals.

Similarly, a winding up order may not be granted where a company made an offer after the presentation of petition to wind up, to pay out the petitioner's claim with costs where it was decided that the proper direction would be to postpone the making of the order to allow the company to carry out the offer. (See *Re Home Assurance Association* [1971] LR 12 Eq. 112; *Re International Contract Co. Ltd.* 14 LT 726.)

A winding up order may also be refused if the motive of the petition was unreasonable and done only for the primary purpose of putting pressure on the company to pay its debt as in the situation described by Jessel M.R. in *Re St. Thomas Dock Co.* [1876] 2 Ch. D 116:

> The petition may be and probably is, presented with the idea of getting paid, not of getting paid under the winding up, but of getting paid by reason of the company not daring to meet the threat or risk of being wound up, which is, I will not say an illegitimate use, but not the primary use of a petition for winding up of a company.

On the same principle enunciated by Jessel M.R. above, a winding up petition brought on account of a debt on which there existed a *bona fide* dispute is considered an abuse of the process of the court and would be dismissed (see *Re Sanpete Builders (S) Pte Ltd* [1989] 1 MLJ 393, per Chao Hick Tin JC High Court Singapore).

The Grounds Advanced By The Opposers

Having neglected to respond to the statutory notice of demand of the petitioner the respondent shall now be deemed to be unable to pay its debt of RM3,027,183.78 due to the petitioner by the operation of s. 218(2) of the Act, and accordingly an order of winding up may be made.

A company would not be able to pay its debt if it is insolvent. But the test of insolvency is not whether a company's liabilities exceeds its assets but whether it is able to meet current demand upon it, that is, whether it is commercially insolvent. This principle was applied by the Privy Council in the Singapore case of *Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 and adopted in *Sri Hartamas Development Sdn Bhd v. MBF*

Finance Bhd [1992] 1 CLJ 637; [1992] 1 MLJ 313, where Gunn Chit Tuan, SCJ speaking for the Supreme Court approved the following the oft-cited passage from Buckley on the *Companies Act* 13th edn:

> In such a case it is useless to say that if its assets are realised there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this may be so, yet if it have no assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Having read their affidavits it would appear that the only ground worthy of consideration is the claim of both the contributories and the secured creditor that the respondent is still a viable concern and could pay its debt if given the opportunity to do so. Both the contributories and the secured creditor relied on the claim made in the affidavit of Seow Chee Hoong wherein he exhibited the respondent's bulky statement of account for the period March to October 1998 to indicate that the respondent's turnover was around the region of RM3 million and that it is capable of generating a monthly turnover of the same amount in the future.

But even if the respondent could generate that much turnover, the affidavits of the supporting creditors point to the inevitable conclusion that the respondent is not only commercially insolvent but, as was aptly put by counsel for the petitioner, Encik Selvanathan, hopelessly insolvent. This is clear from:

(i) the affidavit [encl. 58] of Khir Johari the manager of the petitioner bank at para 16 which read as follows:

> I am aware that besides owing the petitioner a sum of RM3,027,183.78, a debt which was never denied the respondent had a total debt of over RM120,000,000.00 (in the very least) as evidence from the list of creditors supporting the petition. Even assuming that the amount of bills/invoices issued by the respondent in its business from the month of March to October 1998 amounts to approximately RM26,000,000.00, the court ought to consider that this only represent a monthly sale of about RM3,000,000.00. After taking into account operating costs and other overheads this clearly shows that the respondent is not even able to repay the interest owing to all the bank.

Neither the contributories nor the secured creditor deny the accuracy of this averment. A close examination of the list filed by the petitioner under Companies Winding-Up Rules (encl. 44) confirms the accuracy of his claim in respect of the total amount owed by the 18 creditors in the list.

(ii) the affidavit (encl. 9) of the creditor Md. Tahir (used in support of his earlier application for the appointment of the provisional liquidator of which due notice had been given by the respondent to use this affidavit for his present petition), that the respondent had liabilities in excess of RM240,000,000 and that there was no funds in the respondent's accounts.

Although this claim was not substantiated with any report or accounts, the respondent itself did not dispute the allegation of this creditor.

(iii) the preliminary report (encl. 59) submitted by the provisional liquidator (Wong Soon Fong) exh. WSF-l – item 9.1 to 9.5 which read as follows:

> 9.1 The Company operating conditions has deteriorated at the time of the appointment of the provisional liquidator and was further affected by the following:
>
> a) Ipoh High Court Order to return 268 units of plant and machinery to Tunas Potensi Sdn Bhd/Bank Pembangunan Malaysia Berhad [Appendix PR-2].
>
> b) Generators, vans and other vehicles had been repossessed by various financial institutions such as Sogolease Advance (Malaysia) Sdn Bhd, Hong Leong Finance Berhad etc ... [Appendix PR-3].
>
> c) Repossession notices from other financial institutions to take possession of the majority of plant and equipment financed such as Affin Finance Berhad, PLC Credit and Leasing Sdn Bhd, Unikampar Credit and Leasing Sdn Bhd, Hong Leong Finance Berhad, Aseam Credit Sdn Bhd, MBF Finance Berhad etc ... [Appendix PR-4].
>
> d) Discontinuation of factory bus services to the factory workers due to non payment of bills to the bus service providers.
>
> e) Deliberate non productivity from the workers due to late payment of salaries, EPF, SOCSO and other payments due to the workers.
>
> f) Threat to cut electricity supply and telephone services due to non payment of bills. [Appendix PR-5].
>
> g) Refusal of suppliers and service providers to provide services to the Company unless payment is made in advance due to non payment of substantial trade bills.
>
> 9.2 The Company has no monies to support its operations and cannot even purchase necessities. This was further aggravated by brought forward problems such as non payment of salaries and EPF.
>
> 9.3 To prevent further losses from arising, production was shifted to the Gopeng and Kepong factories. The number of employees at the Menglembu factory was reduced.

> 9.4 The current operating cost of the Gopeng and Kepong factories and the laundry operations is being met with advances from the purchaser and in my opinion is sufficient to meet the current orders the Company has in hand.
>
> 9.5 I'm unable to commit for further orders as I DO NOT know how much longer the Company will have any plant and machinery to work on the orders and I have been informed that certain financial institutions has commenced legal proceedings to have their plant and machinery removed from the Company premises.

(iv) the further affidavit (encl. 61) of the provisional liquidator dated 28 November 1998 – para 8 – preliminary finding as to the state of affairs of the respondent's company shows that it is not a going concern and is insolvent and is unable to generate sufficient fund to meet its monthly financial commitment even with the alleged monthly turn over of 3 million.

(v) the report (exh. CCK-14 in encl. 28) of the Economic and Financial Consultant, Arthur Andersen in the affidavit of the Senior Manager Chew Chee Keong of the opposing creditor Hong Leong Bank Berhad. The executive summary of the consultant exh. CCK-14 at p. 13 with regard to the performance of the respondent company read as follows:

> Summary
>
> Our analysis indicates that for OAB and ORO to meet their respective costs, including financing costs for hire-purchase and lease and interest payments on past bills due, the following should be considered:
>
> + OAB would have to increase its turnover by 30% to RM152 million, representing a production capacity of 107% which exceeds its maximum capacity, attributable mainly to the high borrowing costs; whilst
>
> + ORO (a subsidiary of the Respondent) would have to increase its turnover by 70% to RM1.3 million, mainly due to its high rental expenses.
>
> Based on historical performances of OAB and ORO, both companies have not achieved such sales levels and do not appear to be able to achieve the breakeven levels.

The insolvency of the respondent as averred to in the affidavits of the provisional liquidator and the report of the Economic and Financial Consultant Arthur Andersen were not challenged by the opposers or the respondent itself.

Given the fact that the respondent is hopelessly insolvent, I fail to see how a winding up can be avoided under the circumstances. To continue its business the respondent would require the injection of more funds into the company, not only to forestall the demand of its creditors but to pay for its overheads. It is clear that with a turn over of some RM3 million a month the respondent would not be able to meet its enormous contingent and prospective liabilities even assuming that the whole of this sum is applied to meet such liabilities.

The conclusion may well be different if it can be proved to the satisfaction of the court that the respondent has access to or is expecting some funds whether from further borrowings or from the fresh injection of capital or if the respondent has entered into any scheme of arrangement with its creditors to restructure its debt to merit the consideration of the court to suspend or postpone the making of the order or where appropriate to refuse it altogether in exercise of its powers under s. 221 of the Act.

But even assuming that the issue should not be resolved merely on the question of the respondent's insolvency alone, none of the other grounds put forth by the opposers are sufficient to dissuade the court not to order the winding up of the respondent. The averments that that the contributory's minority shareholding in the respondent company would not be safeguarded, and that over 1000 workers would have to be laid out were clearly not legitimate grounds to withold or postpone the winding up of the company. The former involves the personal interest of the contributory and has nothing to do with the interest of the respondent; the latter is the inevitable consequence of winding up which had been held in *Re Craven Insurance Co. Ltd* [1968] 1 All ER at 1144 to be a matter outside the discretionary consideration of the court.

Neither were the two other substantive grounds put forth by the secured creditor Hong Leong Bank Bhd. of any merit.

Further, it was contended that the petitioner and the other supporting creditors would not gain anything if the respondent is wound up as there would not be no money or assets left to pay them. All the properties, assets and monies of the respondent had been secured in its favour, as the exhs. CCK-3 to 9 of its affidavit encl. 28 would show, the same ground was relied upon by the contributory Seow Chee Hoong in his affidavit. Standing alone, it is clear that this ground is unsustainable. The short answer is to be found in s. 221 of the Act which provides *(inter alia)* that:

> ... the court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of the petition by a contributory that there will be no assets available for distribution amongst the contributories.

It was further submitted that the petition was presented for a collateral purpose of dislodging the debenture from the hands of his client as in the event that a winding up is ordered these debentures and other charges which it had secured on the respondent within six months of the commencement of winding up, would be rendered invalid by the operation of s. 294 of the Act. While I have no difficulty in accepting the general proposition that a petition to wind

up a company for a collateral purpose may be an abuse of the process of the court, it is clear to me that pure and simple, the creditor's petition in the instant case was to recover the debt of over RM3 million. Under s. 294 those assets would be rendered invalid only if it can be proved that the respondent was infact insolvent immediately after the creation of the charges. Whether or not there would be assets left with the respondent to pay its creditors is a matter which has to be left in the hands of the liquidator who would invariably have to take into account the validity of the secured charges in the hands of the Hong Leong Bank Bhd. There is absolutely no merit on this ground.

Secondly, it was contended that the petitioner had verbally or by conduct agreed not to take any step to wind up the respondent pending a definite decision by a majority of the creditors to restructure the respondent's debt by a restructuring scheme proposed by the public accountant firm of Arthur Andersen & Co. The existence of this agreement was however denied by the petitioner and the respondent. Having perused the documents exhibited in the affidavit, it is clear to me that they did not support the existence of such an agreement written or oral or even provide any semblance of one sufficient to enable me to consider acting under s. 221(1) of the Act to adjourn the hearing conditionally or unconditionally or to make any interim order.

Having found that all the other considerations put forth by the two opposers in this petition untenable it is clear to me that all that is required to be considered (apart from the paramount question of insolvency of the respondent alluded to earlier), is basically the intrinsic economic interest of the contributory shareholders and the secured creditor as against the collective interests of the other 15 unsecured supporting creditors. In the case of *Certico Sdn. Bhd. v. The Tropical Veneer Co. Bhd.* [1988] 2 MLJ 665, Shankar J had to decide whether to order a winding up of Tropical Veneer which owed the UMBC Bank a sum of over RM8 million which was secured by debentures. The company also owed other unsecured creditors a sum of over RM6 million. Certico Sdn. Bhd. one of the unsecured creditors presented a petition to wind up the company. The bank applied to dismiss or stay the petition. It was held that in the circumstances of that case, the unanimous wish of the unsecured creditors must prevail over the bank who was a secured creditor. In so holding His Lordship relied on the following passages in McPherson – *Law of Company Liquidation* 2nd edn 1980:

> Opposition to a winding up may proceed from the petitioner's fellow creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from shareholders. The significance of opposition to winding up varies in direct opposition to the relative importance of the opposing interest involved. Where the company is insolvent, the foremost consideration naturally is the interests of the creditors; and these prevail over the interests of other

persons likely to be affected by the winding up, such as the company and shareholders. As regard creditors, more importance attaches to the views of unsecured creditors for the obvious reason that, unlike the secured creditors, they have no means other than winding up by which they can obtain payment of their debt. (pages 61, 62)

Obviously the general or unsecured creditors are the ones most likely to be affected by the refusal to make an order, for it will deprive them of what is virtually their only remedy against the company. It follows that their wishes in the matter are, as against those other creditors, entitled to primary consideration (*Re Airfast Services Pty. Ltd.* (1976 2 ACLR) (page 64).

For practical purposes the debenture holders in this case were virtually in the same position as shareholders since they had an obvious interest in ensuring that the company and its business were continued so that the profits earned could be used to discharge the company's liabilities for principal and interest on the debentures. In circumstances such as these it would be most unjust to refuse the order since a secured creditor, when he makes his loan, bargains to receive security as his protection against loss in the event of winding up and it would not be right to give him the power to impair the remedy which exists primarily for the benefit of unsecured creditors. However, the decision probably does not go so far as to establish that the wishes of unsecured creditors in the matter of winding up will invariably be preferred to those creditors who are secured, although this is likely to be so in all cases except those where the injury which winding up will inflict upon the latter is out of proportion to the benefit it will bestow on the former. (page 335)

I am in complete agreement with the views expressed by the learned author and would apply the same reasoning expressed therein in so far as the interests of the opposers in the instant petition are concerned.

For the reasons stated I would grant a winding up order with costs.